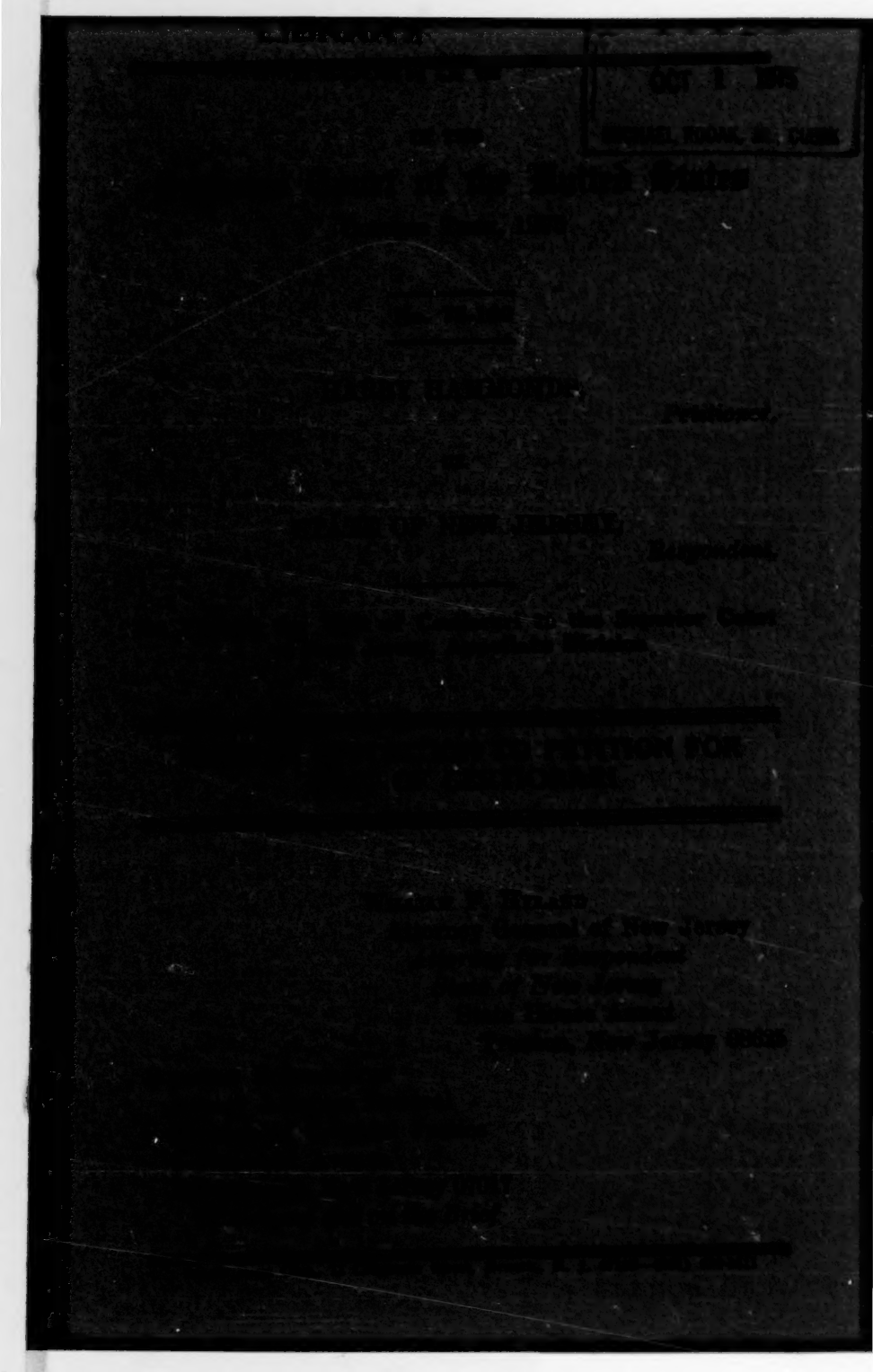

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-160

HARRY HAMMONDS,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counter-Statement of Matter Involved

Pursuant to Supreme Court Rule 40-3, respondent, State of New Jersey, respectfully submits the following additions and corrections to petitioner's statement of the case.

Petitioner, Harry Hammonds, was charged, by the Burlington County Grand Jury, with possession of marijuana and possession of the same substance with intent to distribute. On March 4, 1974, petitioner moved, before the Hon. Paul R. Kramer, in the Burlington County Court, to suppress evidence seized as a result of a search of his automobile by State Police Trooper Joseph Pitko. The court denied the motion. On March 18, 1974, Hammonds was found guilty of possessing marijuana with intent to distribute and was sentenced to four months in the Burlington County jail and fined $2,500.

Petitioner appealed his conviction to the Superior Court of New Jersey, Appellate Division. Hammonds asserted that the narcotics which had been seized by Trooper Pitko should have been suppressed as it was the product of an illegal search. On March 10, 1974, the Appellate Division, in an unpublished opinion, rejected petitioner's argument and affirmed his conviction. Petitioner then petitioned the New Jersey Supreme Court for certification. Certification was denied on June 12, 1975.

At the hearing on the motion to suppress evidence, the State's witness was New Jersey State Trooper Joseph Pitko. He testified that on January 30, 1973, he was on routine patrol on the New Jersey Turnpike. At approximately 3:30 P.M. he observed a green Ford proceeding at ninety miles per hour (T2-17 to 3-18).* The Trooper stopped the vehicle and asked the driver, whom he identified as defendant, for his license and registration. Defendant produced the requested documents. The officer noticed that defendant "looked a little nervous and started to shake" when he looked through his wallet for his license and registration (T4-2 to 13).

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* "T" refers to transcript of proceeding of March 4, 1974.

The officer had observed that Hammonds' automobile was "sitting low in the rear" and he asked defendant what he had in the trunk. Defendant's response was, "Clothes." (T4-14 to 18). The Trooper then asked defendant, "Do you mind if I take a look" (T4-19). Defendant, who was still "shaking and had begun to sweat", stated, "I don't have the key" (T4-20 to 22). The officer then inquired "Does the key to the ignition open the trunk?" In response to the inquiry, the accused removed the keys from the ignition (T4-22 to 5-1) and inserted one of them in the trunk. It failed to unlock the trunk. Pitko then asked, "How about the other key?" Defendant utilized the other key, and it unlocked the trunk (T5-2 to 6).

The officer observed that the trunk contained three white cloth sacks and green vegetation which appeared to be marijuana (T5-7 to 12). Hammonds was arrested and Trooper Pitko transported defendant and the marijuana to the State Police Barracks in Moorestown (T5-13 to 17).

Defendant's version of the incident differed in some respects from the testimony given by Pitko. Hammonds testified that after he produced his license and registration, the officer asked him why his "trunk [was] riding low" (T9-1 to 2). Defendant stated that there was no reason "for the trunk to be riding low." (T9-2 to 4). Pitko then commanded, "Well, let's take a look" (T9-5 to 8). The Trooper asked him whether he had marijuana in the trunk of his automobile, and Hammonds responded in the negative (T9-9 to 12). Defendant told the officer that there was no reason to look in the trunk and the officer repeated "Let's take a look in the trunk of your car." (T9-16 to 19). The accused stated that he did not have a key to the trunk. The officer then placed his head

inside the car, pointed to a key on a key chain and said, "Let's try this." (T9-22 to 25). Defendant then took the key and unlocked the trunk of the automobile (T10-2 to 7). Hammonds also stated that he had not been told that he had a right to refuse to open the trunk (T10-8 to 10). Finally, he stated that he had gone through three semesters at the University of Texas (T10-21 to 24).

The Court denied the motion to suppress (Ta6-24 to 25).* Defendant then waived a jury trial and stipulated the testimony given at the motion to suppress as the testimony which would be presented at a trial (Ta7-3 to 10). Defendant also stipulated that the substance which Pitko took from defendant's automobile was found by the police laboratory to be 8.8 grams of hashish and 9.3 pounds of cannabis sativa (Ta10-1 to 10; Ta13-15 to 14-4). Based on the stipulation, the Court found defendant guilty of possessing marijuana with intent to distribute (Ta14-12 to 23).

Reasons for Denying Certiorari

It is petitioner's contention that the evidence seized from his automobile should have been suppressed because it was seized illegally. Petitioner argues that his apparent consent to the search was involuntary and he asks this Court to determine whether he validly consented to the search of his automobile.

Respondent respectfully submits that petitioner fails to allege any "special and important reasons" to support his petition for review on *certiorari*, Supreme Court Rule 19. The New Jersey courts have not decided "a federal ques-

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* "Ta" refers to transcript of proceeding of March 18, 1974.

tion of substance not heretofore decided by this Court." *Id.* Nor does petitioner sustain his arguments by showing that the New Jersey courts have decided the matter at hand in disaccord with applicable decisions of this Court. *Id.*

The issue raised by petitioner has been decided by this Court on several occasions. There is no question as to the constitutional standard to be met before a consent to a search will be considered voluntary. The prosecutor has the burden of proving that the consent was, in fact, freely and voluntarily given. *Bumper* v. *North Carolina,* 391 U.S. 543, 548 (1968). In determining whether a defendant's consent to a search is voluntary, a court must asssess the "totality of the surrounding circumstances . . ." *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 226 (1973). In examining the surrounding circumstances to determine if the consent to the search was coerced "account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." *Schneckloth* v. *Bustamonte, supra* at 229. Furthermore, a showing of no more than mere acquiescence to authority does not constitute consent. *Bumper* v. *North Carolina, supra* at 548-549.

Furthermore, the decisions of the courts of this State are in accord with the applicable pronouncements of this Court. The leading decision in New Jersey on consent searches, and the case adhered to by the courts in the case *sub judice, is State* v. *King,* 44 N.J. 356, 209 A.2d 110 (1965). There, the New Jersey Supreme Court set forth various factors that must be weighed in determining whether consent to a search has been given voluntarily.

Among those factors which courts have considered as tending to show that the consent was coerced are: (1) that

consent was made by an individual already arrested; (2) that consent was obtained despite a denial of guilt; (3) that consent was obtained only after the accused had refused initial requests for consent to search; (4) that consent was given where the subsequent search resulted in a seizure of contraband which the accused must have known would be discovered; (5) that consent was given while the defendant was handcuffed.

Among those factors which courts have considered as tending to show the voluntariness of the consent are: (1) that consent was given where the accused had reason to believe that the police would find no contraband; (2) that the defendant admitted his guilt before consent; and (3) that the defendant affirmatively assisted the police officers. An examination of the facts of a particular case in light of the criterion set forth in *State* v. *King, supra,* will determine, consistently with this Court's pronouncements in *Schneckloth* v. *Bustamonte, supra,* and *Bumper* v. *North Carolina, supra,* whether consent to a search has been given voluntarily.

In the instant case, the New Jersey courts applied the proper standard and determined that petitioner's consent to the search of his automobile was voluntary. Given the facts in the instant matter, there can be no serious dispute with the finding of this State's courts. In the instant case, we initially find a State Trooper confronting an individual who is accused of speeding. This fact alone does not transform an otherwise non-coercive situation into one that overcomes the will of the accused. Were it considered otherwise, consensual searches could almost never take place because, invariably, the situation in which consent to a search is given involves a confrontation between a law enforcement officer and a person who is in some way the subject of official police inquiry. To hold

that consent cannot be given for a search under such circumstances would be to place such artificial restrictions upon consensual searches as to jeopardize their basic validity.

Furthermore, the fact that the officer was armed does not create a coercive atmosphere out of a inherently non-coercive situation. All policemen are armed when they stop vehicles for traffic violations. Petitioner was neither arrested nor taken into custody. Custody involves deprivation of freedom in a significant way. See *Miranda* v. *Arizona,* 384 U.S. 436 (1966). The facts clearly show that the situation in which petitioner found himself was not such as to be conducive to coercion. Moreover, courts have found voluntary consent to search even in situations where defendants had been arrested or were otherwise in custody. Annotation, *Search—Consent While In Custody,* 9 A.L.R.3d 858, 873 and 880 (1966).

After petitioner was stopped, he produced his license and registration at the request of the trooper. The latter then advised him that he had been stopped for exceeding the speed limit. What occurred immediately thereafter was the subject of conflicting testimony. The trial court resolved this question of credibility in favor of the police officer and the Appellate Division concurred in this finding. It is not the function of this Court to act as a finder of fact and review findings of fact made below. Moreover, the trooper's testimony was credible, and the State courts had every reason to believe his testimony.

The officer testified that he asked petitioner what he was carrying in the trunk of his automobile. The accused's response was "clothes" (T4-16 to 18). The officer then asked Hammonds, "Do you mind if I take a

look." (T4-19 to 22). Petitioner responded to the trooper's question by stating that he did not possess the key (T4-23 to 24). The officer then asked him if the key to the ignition opened the trunk (T4-24 to 25). Hammonds then removed the ignition key and inserted it in the trunk. When it failed to unlock the trunk, Trooper Pitko asked defendant if "the other key" might open it. The accused then placed that key in the trunk and unlocked it, revealing the presence of marijuana (T4-24 to 5-20). The foregoing facts are not suggestive of a coercive atmosphere. Trooper Pitko's initial question was merely a request. No reasonable person would have considered it to be a directive to open the trunk. The subsequent conversation did not convert the non-coercive situation into one where petitioner was compelled to act against his will. Petitioner's contention that the search was solely the result of the tropper's demands is not borne out by the facts. The officer never demanded Hammonds' acquiescence to his request to search. Each of Trooper Pitko's remarks was in response to petitioner's remarks or action and did not represent attempts to obtain petitioner's consent by an excessive display of authority. When Hammonds told the trooper that he did not have the key to the trunk, he did not manifest to the officer his unwillingness to consent. On the contrary, Hammonds' remark appeared to imply that the only impediment to a search of his trunk was the fact that he lacked the key. Consequently, Trooper Pitko, who had not received a negative response to his request for permission to view the inside of the vehicle's trunk, inquired as to whether the ignition key unlocked the trunk. This question did not evidence an attitude of persistence, but was a reasonable response to petitioner's statement. Hammonds could have stated that the key to the ignition did

not unlock the trunk. Similarly, when the key with which defendant attempted to open the trunk failed to do so, the patrolman suggested that it may be the wrong key. Again, as in the case with the trooper's prior remark, the suggestion that petitioner utilize another key to unlock the trunk cannot be seen as the officer's insistence that Hammonds consent to a search, despite the latter's unwillingness to do so. The trooper's statement was merely a response to the situation. Since petitioner never indicated to the officer that he did not wish to consent, the officer cannot be said to have persistently demanded that defendant consent to a search.

Logically, persistent demands would follow a refusal to adhere to an initial request or demand. Moreover, any reasonable person in Hammond's position would not have seen the officer's remarks as demands that he acquiesce in the trooper's desire to conduct a search. Petitioner knew that he had not given the officer a negative response to his request to look in the trunk. Furthermore, it must have been apparent to Hammonds that Pitko's responses to his remark and conduct were natural under the circumstances and could not be classified as attempts to be overbearing.

Further evidence that the police officer was not overbearing can be seen from his behavior. At no point did he do anything to open the trunk. This clearly showed petitioner that Pitko neither had the authority to conduct a search nor intended to search Hammonds' vehicle without the latter's consent. Under these circumstances, petitioner's action in unlocking the trunk of his automobile could not have been mere acquiescence to authority.

While Hammonds' denial that he had a key and his initial insertion of the wrong key may have indicated that

defendant was reluctant to permit a search of his automobile, such initial hesitation does not mean that he could not have consented after reflecting on the matter. It is to be expected that an individual who is knowingly in possession of contraband would not be inclined to permit a police search.* If a person consents to a search requested by the police under such circumstances, he probably does so in the hope that the appearance of cooperation will dissuade the law enforcement officer from conducting a search. Or, he may believe that the incriminating article will not be found or will not be recognized as such by the law officer. As the Court stated in *United States* v. *Katz,* 238 F.Supp. 689, 695 (S. D. N. Y. 1965):

> "It cannot be gainsaid that people detained by police often assume it to be advantageous to be completely cooperative, usually, no doubt, with the hope that such conduct in the long run will be the best route out of their predicament."

Petitioner's seeming reluctance in the instance case may have been only a means of delaying his ultimate decision until he could reflect as to his alternatives. Alternatively, it is possible that Hammonds' initial decision not to consent to a search may have given way to a change in strategy and a belief that it would be in his interest to cooperate with the officer. Many courts have held that a defendant's initial refusal to permit a search will not vitiate his subsequent consent. See, *e.g. People* v. *Garcia,*

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* "A person need not have a positive desire that a search be conducted in order for his consent to have been voluntary and effective." *United States* v. *Thompson,* 356 F.2d 216, 220 (2nd Cir. 1965).

227 Cal.App. 2d 345, 38 Cal. Rptr. 670 (Dist.Ct.App. 1964); *People* v. *Ely,* 220 Cal.App. 2d 451, 33 Cal.Rptr. 725 Dist.Ct.App. 1963); *People* v. *Ross,* 206 Cal.App. 2d 542, 24 Cal.Rptr. 1 (Dist. Ct. App. 1962); *State* v. *Hauser,* 257 N.C. 158, 125 S.E.2d 389 (Sup.Ct. 1962).

Similarly, courts have held consents to searches to be valid even though the defendants attempted to evade the police when first approached by law enforcement officers. *People* v. *Randal,* 226 Cal.App.2d 105, 37 Cal.Rptr. 809 (Dist.Ct.App.1964); *People* v. *Williams,* 148 Cal.App. 2d 525, 307 P.2d 48 (Dist.Ct.App.1957); *People* v. *Garnett,* 148 Cal.App.2d 280, 306 P.2d 571 (Dist.Ct.App. 1957); *Longo* v. *State,* 157 Fla. 668, 26 So.2d 818 (Sup.Ct. 1967).

The circumstances surrounding petitioner's consent to the search in the instant case reveal that Hammonds' will was not overcome and that he was not deprived of an opportunity to make an effective choice as to his alternatives. Nor do we have acquiescence to a claim of lawful authority.

Courts have held that a defendant's apparent consent is not voluntary when he is confronted with police officers under circumstances which are so overbearing as to compel him to consent to a search even though he does not want to do so. See, e.g., *United States* v. *Mapp,* 476 F.2d 67 (2nd Cir. 1973); *United States* v. *Wilcox,* 357 F.Supp. 514 (E.D.Pa. 1973); *People* v. *McKelvey,* 23 Cal. App. 3d 1027, 100 Cal.Rptr. 661 (Dist.Ct.App.1972); *People* v. *Cedeno,* 218 Cal.App.2d 213, 32 Cal.Rptr. 246 (Dist. Ct.App.1963); *Earman* v. *State,* 265 So.2d 695 (Fla. Sup. Ct.1972); *People* v. *McGurn,* 341 Ill.2d 632, 173 N.E. 754 (1930); *Marple* v. *State,* 51 Okla. Crim. 240, 1 P.2d 836 (Crim.Ct.App.1931).

The factors which led the courts in the above cases to disallow the searches are not present in the instant case. Unlike the defendants' confrontations with police in those cases, petitioner was not confronted with a display of force or threats, or any other action by Trooper Pitko which would compel him to consent to a search when he would not have done so otherwise.

In other cases, courts have held that consent to searches given by defendants who are led to believe that the police will conduct a search irrespective of their wishes are invalid. See, e.g. *United States* v. *Villano,* 310 F.2d 860 (10th Cir. 1962); *People* v. *Kaigler,* 368 Mich. 281, 118 N.W.2d 406 (Sup.Ct.1962); *Thurlow* v. *State,* 406 P. 2d 918 (Nev.Sup.Ct.1965); *Barnes* v. *State,* 25 Wis.2d 116, 130 N.W.2d 264 (Sup.Ct.1964). In the instant case, Trooper Pitko did not tell or even suggest to petitioner that he would conduct a search if Hammonds did not consent. Rather, he merely requested Hammonds' permission to search.

Voluntary consent has also been found lacking when the police have conducted a search or illegally intruded on the privacy of a defendant or his property prior to asking him for consent to search. Under such circumstances, the defendant is likely to believe that since the police have already conducted a search without his acquiescence, they would probably do so again. Consent given under such circumstances shows only that the accused is resigned to the inevitable search. See, e.g. *United States* v. *Lewis,* 274 F.Supp. 184 (S.D.N.Y. 1967); *People* v. *Zazzetta,* 27 Ill.2d 302, 189 N.E.2d 260 (Sup.Ct. 1963); *People* v. *Porter,* 37 Misc.2d 73, 236 N.Y.S. 2d 162 (Sup. Ct.1962); *Mullins* v. *State,* 75 Okla.Crim. 417, 133 P.2d 239 (Okla.Ct.Crim.App.1943). In the instant case, Trooper Pitko did not intrude on defendant's person or his automobile in any manner whatsoever.

Courts have also held that mere acquiescence to a claim of lawful authority does not constitute voluntary consent. Thus, in *Bumper* v. *North Carolina, supra,* this Court held that consent to a search given by defendant's grandmother, who owned the house searched, was not a valid waiver of her Fourth Amendment rights, because one of the officers who conducted the search falsely claimed that he had a search warrant. In a case comparable to *Bumper,* the Court in *Newman* v. *United States,* 277 F.2d 794 (5th Cir. 1960), held that the defendant had not validly consented to have his records examined by the Internal Revenue Service when he agreed to give up his records after an I.R.S. agent asserted that he had a right to take and examine them. See also *State ex rel. Lewis* v. *Warth,* 131 W.Va. 437, 48 S.E.2d 6 (Sup.Ct. 1948). The case sub judice is totally different from the foregoing cases, as the trooper did not even hint that he had the authority to conduct a search.

The fact that defendant knew that he possessed contraband in the trunk of his automobile does not mean that he did not voluntarily consent to a search. As pointed out earlier, a defendant in possession of evidence that he committed a crime may believe that cooperation is in his best interest. That is why courts have consistently upheld searches based on consent even though defendants knew that contraband would be found and at the same time claimed innocence. See, *e.g., State* v. *McNair,* 59 N.J.Super. 453, 158 A.2d 7 (App.Div. 1960), *cert.* den. 365 U.S. 829 (1969); *Gendron* v. *United States,* 227 F. Supp. 182 (D.Mo. 1964), petition to vacate sentence dismissed, 340 F.2d 601 (8th Cir.1964); *People* v. *Sanchez,* 191 Cal.App.2d 783, 12 Cal.Rptr. 906 (1961); *People* v. *Bennett,* 208 Cal.App.2d 317, 25 Cal.Rptr. 257 (1962); *People* v. *Amiotte,* 215 Cal.App.2d 176, 30 Cal.Rptr. 102

(1963), *cert.* denied 375 U.S. 987; *United States* v. *Katz,* 238 F.Supp. 689 (S.D.N.Y. 1965); *People* v. *King,* 175 Cal. App.2d 386, 346 P.2d 235 (1959); *Kershner* v. *Boles,* 212 F.Supp. 9 (D.W.Va.1963), modified on other grounds, 320 F.2d 284 (4th Cir. 1963); *People* v. *Albino,* 184 Cal. App.2d 84, 7 Cal.Rptr. 246 (1960); *People* v. *Bradley,* 243 Mich. 609, 220 N.W. 788 (1928); *State* v. *Plas,* 391 P.2d 867 (Nev.1964); *State* v. *McPlak,* 243 N.C. 243, 90 S.E.2d 501, *cert.* denied 351 U.S. 919; *State* v. *Barron,* 238 Ore. 527, 395 P.2d 158 (1964), *cert.* denied 380 U.S. 920 (1964).

One other factor which leads to the conclusion that petitioner's consent to the search was voluntarily given is the assistance which Hammonds gave Trooper Pitko in conducting the search. It was petitioner, and not the trooper, who voluntarily opened the car trunk, revealing the presence of marijuana. There can hardly be better evidence of voluntariness than that which shows that the defendant assisted in the search. Such assistance has been held, by many courts, to clearly indicate the voluntary nature of defendant's consent. See, *e.g. United States* v. *Katz, supra; People* v. *Bracamonte,* 194 Cal.App.2d 167, 15 Cal.Rptr. 54 (Dist.Ct.App.1961); *Dickerson* v. *People,* 499 P.2d 1196 (Colo.Sup.Ct.1972); *James* v. *State,* 223 So.2d 52 (Fla.Dist.Ct.App.1969); *Batch* v. *State,* 208 So.2d 846 (Fla.Dist.Ct.App.1968); *Reynolds* v. *Commonwealth,* 273 S.W.2d 89 (Ky.Ct.App.1954); *State* v. *Suchy,* 31 OhioMisc. 265, 58 Ohio Ops.2d 376, 277 N.E.2d 459 (Ct. Common Pleas 1971); *Sims* v. *State,* 73 Okla.Crim. 321, 121 P.2d 317 (Crim.Ct.App.1942); *State* v. *Barron, supra; State* v. *Thomas,* 78 S.D. 568, 105 N.W.2d 549 (Sup.Ct.1960); *Lee* v. *State,* 164 Tex.Crim. 106, 296 S.W. 2d 782 (Crim.Ct.App.1956); *Stewart* v. *State,* 244 S.W. 2d 688 (Tex.Civ.App.1951).

Finally, it is significant that petitioner is not an uninformed person. He attended college for three semesters and the court found, from the manner in which he testified, that he was a man of "very obvious intelligence" (Ta6-16 to 18). Clearly, Hammonds' testimony demonstrated that he was intelligent and informed. This fact, and his educational background, clearly indicate that he acted knowingly and voluntarily when he consented to the search.

Given the foregoing, it is clear that the law of consent searches, as set forth by this Court, is clear and that the courts of New Jersey have applied the standards set forth by this Court in determining whether the search in the case at bar was valid. Moreover, this State's courts' examinations of the totality of the circumstances underlying the search in the instant cases is in accord with the manner in which courts throughout the country have approached this matter. In fact, petitioner does not contest the immediately foregoing. Rather, he asks this Court to undertake a review of the facts of this case to determine if the search was valid. Clearly, such is not the function of this Court.

CONCLUSION

It is respectfully submitted that the petitioner has failed to substantiate any claim of constitutional error in the New Jersey courts. He asks this Court to examine the facts of this case to determine whether the findings of the New Jersey courts is supported by the evidence. Clearly, it is not the function of this Court to undertake such a duty. Therefore, respondent, State of New Jersey, respectfully prays that the writ of certiorari sought in the above named petition before this Court not issue.

Respectfully submitted,

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